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#### Re: Comments on Proposed Administrative Civil Liability Order No. R5-2013-0519

Dear Mr. Landau and Mr. Pulupa:

Associated General Contractors (AGC) of California has been the voice of the construction industry since 1920. We are an organization of construction firms and industry-related companies committed to improving our physical environment through our commitment to the principles of Skill, Integrity and Responsibility. We represent over 1,000 contractors, specialty, and associate member companies throughout California.

While AGC of California does not normally comment on individual enforcement actions, the proposed penalty action in Order No. R5-2013-0519 against Donahue Schriber Asset Management Corporation for the Rocklin Crossings Project in Placer County, California, raises issues due to the precedent that this penalty action could set, which is contrary to State policy.

#### A. **Using \$10 per gallon for Construction Stormwater penalties is not consistent with the State Water Board's Enforcement Policy.**

AGC of California strongly objects to the Regional Water Quality Control Board's use of \$10 per gallon as a base amount to compute the proposed penalty for the alleged discharge violations in ACL No. R5-2013-0519 against Donahue



Schriber. The State Water Resources Control Board's 2010 Enforcement Policy clearly states that a maximum amount of \$2.00 per gallon should be used to determine the per gallon penalty amount for storm water. This is the rule, except in cases where explicit findings, supported by evidence demonstrate that "where reducing these maximum amounts results in an inappropriately small penalty, such as dry weather discharges or *small volume discharges that impact beneficial uses*" and that in those instances, "a higher amount, *up to the maximum* per gallon amount, may be used." (See 2010 Enforcement Policy, p. 14 (emphasis added).) Since this was not a dry weather discharge and the draft penalty document does not seem to include any conclusive findings or evidence that beneficial uses were actually impacted, the use of \$10 per gallon is inconsistent with the express language of the Enforcement Policy.

Further, the Regional Board cannot allege that the amount released in this matter is not a "high volume discharge" that should not be given the per gallon reduction set forth in the Enforcement Policy, because other recent Administrative Civil Liability ("ACL") Complaints with a *lower volumes* than the one at issue at Rocklin Crossings (76,613 gallons) used \$2 per gallon – namely, this Regional Board's own Cascade Crossing, ACL No. R5-2013-0520 (37,500 gallons) for the same storm event as the one in Rocklin Crossing, and Placenta-Yorba Linda Unified School District, ACL No. R8-2010-0024 (55,887 gallons).

**B. Using \$10 per gallon for Construction Stormwater penalties is not consistent with other Construction Stormwater ACLs.**

The State Water Board's Enforcement Policy strives "*consistent enforcement*" statewide. (2010 Enforcement Policy at pg. 1.) Thus, the stated goals of the Enforcement Policy are:

"...to protect and enhance the quality of the waters of the State by defining an enforcement process that addresses water quality problems in the most efficient, effective, *and consistent manner*. In adopting this Policy, the State Water Board intends to provide guidance that will enable Water Board staff to expend its limited resources in ways that openly address the greatest needs, deter harmful conduct, protect the public, and achieve maximum water quality benefits. Toward that end, it is the intent of the State Water Board that the *Regional Water Boards' decisions be consistent with this Policy*.

(*Id.* at pg. 1. (emphasis added).) Thus, all discharge penalties in similar construction stormwater matters should be determined in a manner consistent with the express goals and intent of the 2010 Enforcement Policy. The currently proposed ACL No. R5-2013-0519 fails to meet that consistency requirement.

Every construction stormwater ACL penalty found that was imposed since the 2010 Enforcement Policy was adopted in 2010 has used \$2.00 per gallon as the starting point, except one, for EI-PLA 75 LLC, ACL No. R8-2010-0025, which used \$3.00. In the EI-PLA matter, which had a larger discharge of 101,631 gallons, and higher culpability and history of violations factors, the penalty came out at \$197,367, which is less than the amount proposed against Donahue Schriber for a smaller discharge volume. In addition, in the EI-PLA matter, the Regional Board did not automatically jump from \$2 per gallon to the maximum of \$10, but used a lesser amount of \$3 per gallon (although no express justification was included for this value).

In this one instance in the EI-PLA matter where a higher amount of \$3 was used, the ACL followed a number of enforcement actions against the Discharger by the City of Placentia (*see* ACL Order No. R8-2010-0025 at pg. 2, para. 5.b.), two Stop Work Orders, a Cease and Desist Order, two citations totaling \$300 (*id.*), and two Notices of Violation from the Santa Ana Regional Board (*id.* at pg. 3, para. 5.d. and pg. 4, para. 5.k.). That Complaint cited a litany of alleged violations, including failing to employ effective erosion and sediment controls despite numerous warnings and inspections, and failing to implement effective tracking and perimeter controls, effective trash and waste management controls, and adequate storm drain protection among other violations. (*See id.* (R8-2010-0025).) The numerous and repeated violations in the EI-PLA case are not found in the facts for the Rocklin Crossings case.

For the reasons set forth above, AGC strongly recommends ACL No. R5-2013-0519 must be recalculated using a \$2.00 per gallon base amount prior to adoption in order to be consistent with the Enforcement Policy and with other ACLs issued both statewide and in this region.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Thomas T. Holsman".

Thomas T. Holsman  
CEO  
AGC of California

